

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: (SUMMARY ORDER). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals
for the Second Circuit, held at the Daniel Patrick Moynihan
United States Courthouse, 500 Pearl Street, in the City of
New York, on the 29th day of August, two thousand seven.

PRESENT:

HON. DENNIS JACOBS,
Chief Judge,
HON. GUIDO CALABRESI,
HON. RICHARD C. WESLEY,
Circuit Judges.

JUN JIAN ZHENG,
Petitioner,

v.

ALBERTO R. GONZALES, UNITED STATES
ATTORNEY GENERAL, MICHAEL CHERTOFF,
SECRETARY OF THE DEPARTMENT OF
HOMELAND SECURITY, AND DEPARTMENT
OF HOMELAND SECURITY,
Respondents.

03-40020-ag
NAC

1 **FOR PETITIONER:** **Douglas B. Payne, New York, New**
2 **York.**

3
4 **FOR RESPONDENTS:** **Thomas P. Colantuono, United States**
5 **Attorney for the District of New**
6 **Hampshire, Aixa Maldonado-Quñones,**
7 **Assistant U.S. Attorney, Concord,**
8 **New Hampshire.**
9

10 UPON DUE CONSIDERATION of this petition for review of a
11 decision of the Board of Immigration Appeals ("BIA"), it is
12 hereby ORDERED, ADJUDGED, AND DECREED, that the petition for
13 review is DENIED.

14 Jun Jian Zheng, a citizen of the People's Republic of
15 China, seeks review of a May 5, 2003 order of the BIA
16 denying his motion to reopen his removal proceedings. *In re*
17 *Jun Jian Zheng*, No. A70 530 107 (BIA May 5, 2003). We
18 assume the parties' familiarity with the underlying facts
19 and procedural history of the case.

20 ____We review the BIA's denial of a motion to reopen for
21 abuse of discretion. See *Kaur v. BIA*, 413 F.3d 232, 233 (2d
22 Cir. 2005) (per curiam); *Jin Ming Liu v. Gonzales*, 439 F.3d
23 109, 111 (2d Cir. 2006). An abuse of discretion may be
24 found where the BIA's decision "provides no rational
25 explanation, inexplicably departs from established policies,
26 is devoid of any reasoning, or contains only summary or
27 conclusory statements; that is to say, where the Board has
28 acted in an arbitrary or capricious manner." *Kaur*, 413 F.3d

1 at 233-34; *Ke Zhen Zhao v. U.S. Dep't of Justice*, 265 F.3d
2 83, 93 (2d Cir. 2001).

3 Our review of the record discloses no abuse of
4 discretion in the BIA's denial of Zheng's motion to reopen
5 based on ineffective assistance of counsel, because Zheng
6 failed to comply with the requirements set forth in *Matter*
7 *of Lozada*, 19 I. & N. Dec. 637 (BIA 1988).

8 Zheng argues that it would have been futile to comply
9 with the requirements of *Matter of Lozada* because Robert
10 Porges, one of the attorneys at the law firm representing
11 him during the time of his immigration proceedings, had been
12 disbarred. However, Zheng was represented during his asylum
13 hearing by a different attorney from the Porges Law Firm,
14 Victor Ocampo, Esq., and it is not alleged that Ocampo has
15 been disbarred or is otherwise not in good standing.

16 Alternatively, Zheng argues that he need not comply
17 with *Lozada* because counsel Ocampo's error was clear from
18 the record, given his admission to the IJ that he was
19 unprepared, and his willingness to continue nevertheless.
20 *Cf. Yi Long Yang*, 478 F.3d at 142 (requiring "substantial
21 compliance" not "slavish adherence" to *Lozada* where the
22 attorney who rendered ineffective assistance was eventually
23 disbarred and claim of ineffective assistance is "clear on

1 the face of the record."). But, Zheng has failed to
2 establish that he was prejudiced by a deficiency in
3 performance. Zheng's motion did not specify evidence that
4 Ocampo failed to introduce or witnesses whom he did not
5 call, or what other facts Zheng would have testified to if
6 better prepared. Accordingly, the BIA properly denied his
7 motion. *Id.* (citing *Esposito v. INS*, 987 F.2d 108, 111 (2d
8 Cir. 1993)).

9 Furthermore, we need not decide whether the BIA erred
10 by failing to consider the medical report Zheng offered in
11 support of his motion to reopen, because there is no
12 realistic possibility that any such error alters the result
13 on remand. See *Cao He Lin v. U.S. Dep't of Justice*, 428
14 F.3d 391, 401 (2d Cir. 2005). Zheng's motion failed to
15 present material evidence that could not have been presented
16 at the prior hearing. See 8 C.F.R. § 1003.2(c)(1). Zheng
17 offers no explanation why he could not have seen the doctor
18 at an earlier date, so that his report could be submitted at
19 his hearing. Second, the medical report offers no new
20 information to support the claim that Zheng suffered
21 persecution, directly or derivatively by reason of his
22 wife's alleged forcible sterilization. See *Kaur*, 413 F.3d

1 at 233-34.¹ Lastly, Zheng's motion was untimely filed and
2 he does not allege any "changed circumstances arising in the
3 country of nationality." 8 C.F.R. § 1003.2(c)(3)(ii).
4 Consequently, we need not decide whether the BIA erred by
5 failing to consider the medical report; even if there was
6 error, remand to the BIA to consider it would be futile as
7 we can confidently predict that the agency would reach the
8 same conclusion in any event. See *Xiao Ji Chen*, 471 F.3d
9 at 338-39.

10 For the foregoing reasons, the petition for review is
11 DENIED. Having completed our review, any stay of removal
12 that the Court previously granted in this petition is
13 VACATED, and any pending motion for a stay of removal in
14 this petition is DISMISSED as moot. Any pending request for
15 oral argument in this petition is DENIED in accordance with
16 Federal Rule of Appellate Procedure 34(a)(2), and Second

¹ Even if Zheng had been deemed credible, we recently held that "the fact that an individual's spouse has been forced to have an abortion or undergo involuntary sterilization does not, on its own, constitute resistance to coercive family planning policies." *Shi Liang Lin v. U.S. Dep't of Justice*, Nos. 02-4611-ag, 02-4629-ag, 03-40837-ag, --- F.3d 16 ----, 2007 WL 2032066 (2nd Cir. Jul 16, 2007) (*en banc*).

1 Circuit Local Rule 34(d)(1).

2

3

FOR THE COURT:

4

Catherine O'Hagan Wolfe, Clerk

5

6

7

By: _____